INDEX

		Page
I.	Introduction and Summary	1
II.	What issue did the Commission decide?	9
III.	Does the best project win?	12
IV.	Procrustes rides again: the three-way stretch of the permit, application, and notice to include all "mutually exclusive" projects	15
V.	Did this permit "on its face" include High Mountain Sheep?	20
VI.	Congress refused to restrict the public preference to the permit stage: to the contrary, it restricted the permittee's priority, at all stages, to the project identified in the prerequisite notice to public agencies	29
VII.	The dead permit: res judicata or resurrection?	48
VIII.	The issue of post-mortem performance: if the Company's permit included High Mountain Sheep, did the Company perform the permit's work obligations before or after the statutory deadline?	50
IX.	The non-existent issue of the fishery	56
X.	Could Idaho and Oregon veto the Commission's choice of Public Power as a licensee?	60

CITATIONS

COURT CASES:

Carolina Aluminum Co. v. *FPC*, 97 F. 2d 435 (4th Cir. 1938) 50
FPC v. *Oregon*, 349 U.S. 435 (1955) 61
First Iowa Hydro-electric Cooperative v. *FPC*, 328 U.S. 152 (1946) 61
P.U.D. No. 1 of Pend Oreille County v. *FPC*, 308 F. 2d 318 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963) 61, 62

Page

Seattle v. *Beezer*, 376 U.S. 224 (1964), *reversing* 62 Wash. 2d 569 (1963) 61
State of Washington Department of Game v. *FPC*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954) 62
Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) 49, 61
Washington Public Power Supply System v. *Pacific Northwest Power Co.*, 332 F. 2d 87 (9th Cir. 1964) 61
Washington Public Power Supply System v. *Pacific Northwest Power Co.*, 217 F. Supp. 481 (D. Ore. 1963) 61

FEDERAL POWER COMMISSION DECISIONS:

Columbia Railway and Navigation Co., 1 F.P.C. 78 (1933) 50
Northern Natural Gas Co., 11 F.P.C. 278 (1952) 50
Robert P. Wilson, 28 F.P.C. 571 (1962) 50

STATUTES:

Federal Power Act, 49 Stat. 683, as amended, 16 U.S.C. §§ 791 *et seq.* (1964)
Sec. 3(11) 25, 26
Sec. 3(12) 26
Sec. 4(e) 19, 42, 45
Sec. 4(f) 17, 18, 19, 23, 25, 41, 42, 43, 45, 47
Sec. 5 ..... 36, 37, 38, 40, 42, 43, 50, 54
Sec. 7(a) 3, 10, 11, 15, 25, 31, 35, 37, 38, 39, 45, 47
Sec. 10(a) 14, 16, 54
Sec. 24 47
Sec. 313(b) 49

REGULATIONS OF THE FEDERAL POWER COMMISSION:
§ 4.81 47
§ 4.82 22
§ 4.83 20
§ 4.84 ..... 18, 19
§ 5.1 20

HEARINGS, REPORTS, DOCUMENTS:

Hearings on H.R. 14893 before the House Committee on Public Lands, 63rd Cong., 2d Sess. (1914) 44

Page

Hearings on Water Power Before the House Committee on Water Power, 65th Cong., 1st Sess. (1918) ..31, 32, 33, 34, 42

Hearings on Water Power Before the House Committee on Water Power, 65th Cong., 2d Sess. (1919) 38, 39, 44

Hearings on S. 1725 Before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935) 36

H. Rep. No. 842, 63rd Cong., 2d Sess. (1914) 40, 41

H. Rep. No. 715, 65th Cong., 2d Sess. (1918) 29, 30, 38, 39, 42, 45

H. Rep. No. 1147, 65th Cong., 3rd Sess. (1919) 39

H. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 36

2 KINNEY, Irrigation and Water Rights § 715 44

Rules of Practice and Procedure, FPC, § 1.14(a)(2) .. 51

S. Rep. No. 898, 63rd Cong., 3rd Sess. (1915) 42

S. Rep. No. 66, 64th Cong., 1st Sess. (1916) 42

S. Rep. No. 621, 74th Cong., 1st Sess. (1935) 36, 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 462

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

PACIFIC NORTHWEST POWER COMPANY; IDAHO FISH AND GAME COMMISSION; IDAHO WILDLIFE FEDERATION; IDAHO PUBLIC UTILITIES COMMISSION; JONEL C. HILL, PUBLIC UTILITY COMMISSIONER OF OREGON, THE STATE WATER RESOURCES BOARD, THE OREGON STATE GAME COMMISSION, AND THE FISH COMMISSION OF OREGON; WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., OREGON WILDLIFE FEDERATION, FISHERMEN'S COOPERATIVE ASSOCIATION, INC., NORTHWEST FISHERIES ASSOCIATION, ALASKA FISHERMEN'S UNION, PACIFIC FISH CONSERVATION LEAGUE, MAKAH INDIAN TRIBE,
Intervenors.

REPLY BRIEF OF PETITIONER

I. INTRODUCTION AND SUMMARY

The Commission and the Company seem to agree with us that the Middle Snake River offers three distinct potential power developments, mutually exclusive of one another. Each of the three was investigated and separately reported on by the Corps of Engineers before anyone filed an application of any

kind with the Federal Power Commission. The sites of these three big dams are (1) Nez Perce, below the mouth of the Salmon; (2) High Mountain Sheep, above the Salmon but below the Imnaha; and (3) Pleasant Valley, 24 miles above the Imnaha, supplemented by a low re-regulating dam, called Low Mountain Sheep, at a site which is also above the Imnaha.

We all agree that if one of these mutually exclusive projects were built, the other two could never be, and that the applicant for a permit or license would have to make a choice among them. The Corps reports had made this quite plain, before anyone made his selection.

There is no real disagreement that the Company did make such a choice when it filed its permit application on the Corps' Pleasant Valley project in 1954. It chose that specific project because both Nez Perce and High Mountain Sheep, although they were better power projects, involved hot controversies with fishery interests concerned with the protection of anadromous fish runs up the Salmon and Imnaha Rivers.

The Company's choice among the three known alternatives was made explicit three times: (1) in the Company's permit application, (2) in the notice of that application which the statute required the Commission to give to public agencies, and (3) in the permit itself. They are all as precise as the Company and the Commission could make them, in order to accomplish what the Company sought: insulation from the Nez Perce and High Mountain Sheep site controversies, and identification, instead, with the more bland low-dam upstream Pleasant Valley alternative. This was done by a map showing boundaries, by specification of sites not only by name but by references to public land surveys, by statements of heights of

dams, reservoir elevations, upstream and downstream boundaries of the reservoirs, and so on.

The problem is whether the nouns and verbs, the names and numbers, which were used in these three decisive documents to deliberately fence out the "mutually exclusive" Nez Perce and High Mountain Sheep Projects, shall now be parsed in such a way as to include what was then deliberately excluded. This effort is somewhat like trying to prove that Rembrandt did indeed paint a challenged portrait, by analyzing the brush strokes and pigments, when the portrait is in fact that of a man on a motorcycle. But because our opponents do so earnestly argue that this permit was intended by the Commission to give the Company what it then excluded, we do examine the brush marks a little later on. They are not Rembrandt's.

If this permit gave the Company more than it said it wanted, i.e., an option on the other two mutually exclusive projects that it then disavowed, it can only be because the statute, not the terms of the permit, so requires. If it does, this is indeed a unique public resource statute.

The basic difference between us seems to be our different concepts of the philosophy of the statute.

To us, the Federal Power Act has two dominant purposes: (1) the selection of plans best adapted to the conservation and development of the Nation's water resources, (2) preference to public development of these public resources if the public agency's plan is, or can be made, as well adapted as that proposed by an entrepreneur for its own profit.

To us, therefore, Section 7(a) means what it says: a policy of preference to the application of a munici-

pality for a license for a hydroelectric project, a policy so dominant that it must be given full effect, even though this means that the municipality must be allowed time to devise a project as well adapted to the development of the resource as the project already formulated by a prior applicant for a license, a private power company. The statute says so. (Our case does not go to this extreme, because our project is the superior one, as the Commission decided on rehearing.) That dominant policy is subject to only one exception, one loophole: where the project for which the municipality asks a license has been included in a preliminary permit issued to another.

The test of whether the project for which the municipality seeks a license has or has not been included in a prior preliminary permit is not a particularly difficult one. It is akin to the question of whether an appropriation of water is subject to a prior appropriation made by another, or whether a location of a mining claim is subject to another man's prior location. The Federal Power Act solves this in the same manner as do the water and mining laws from which this Act's permit-and-license system was derived. The prescribed test is the notice which the statute requires the priority claimant to publish to initiate his right, in order to establish the magnitude of his claim as well as its priority date. We say that the statutory notice which was given in this case is conclusive. It deliberately excluded the resource for which the permittee now claims priority, and so left unscathed the public preference on all projects not encompassed by that definitive notice, never amended. The municipality's preference on the projects excluded by the notice may be asserted at the licensing stage, in competition with the permittee's application for a

license on the project encompassed by that notice. A fortiori, it may be asserted at the licensing stage in competition with the permittee's application for a license on a project "mutually exclusive" of that which his notice preempted.

Our opponents have an opposite view of the statute. The statute's dominant policy, they think, is the encouragement and protection of development of the Nation's waterways by private enterprise, the protection of the entrepreneur. To them, a permit to a power company to occupy specified sites within specified boundaries—that was this permit—implies, as a matter of law, the right, indeed the obligation, to occupy, examine, and apply for a license upon, all other projects which are "mutually exclusive" of that which is described in the permit. From this premise, the conclusion is reached that when the company ultimately files a license application on a project which, by hypothesis, was "mutually exclusive" of the one described in the notice to public preference agencies and in the corresponding permit, the permit must be deemed retroactively expanded to now include this once-excluded project. Similarly, the notice to public agencies which preceded the granting of the permit must be retroactively enlarged. So also with the original application for the permit. We comment, later, on the circular character of this argument, and the Procrustean concept of the retroactively stretchable permit and notice.

Moreover, our opponents say, the public agency must assert its preference at the permit stage (guessing as best it can how the boundaries of the permit will be stretched later), not at the licensing stage when the company discloses its choice among the "mutually

exclusive" projects that it did not identify in its permit, notice, or application. We will show from the legislative history that Congress rejected a specific proposal to restrict the public preference to the permit stage, and instead established the statutory notice of the permit application as the touchstone to discover at the beginning what was to be included in the priority of a permit, and what resources were to be saved for the later application of the statutory preference for public development.

A word about the equities. The Company points out that it has spent several million dollars. So has Public Power. Much of the Company's money was spent in designing and presenting to the Commission the wholly inadequate Pleasant Valley project. It spent very little—apparently about $5,800—on the High Mountain Sheep project before the three-year term of its permit expired. It spent large sums after that, but on notice—indeed, it told the Commission so—that there was serious doubt that the priority of its Pleasant Valley permit protected this further investment. The High Mountain Sheep project that it thus developed, on a second try, itself proved inferior to Public Power's design. The Company has thus proposed, twice, to underdevelop the Middle Snake River, but seeks a license on the superior plan developed by Public Power, on the plea that the statute intended to protect the exploratory investment of the entrepreneur.

We disagree. Much of Public Power's investment, too, was made in developing plans for an alternative now discarded, Nez Perce. We did this in reliance on the Commission's 1958 decision that that site was the essential one for comprehensive development. High

Mountain Sheep is second choice for both of us, for different reasons. We do not think that either of us has an equity resulting from the fact that we both reached the High Mountain Sheep choice the hard way.

We think the statute was intended to encourage the best and most comprehensive development of the resource, not to protect entrepreneurs. One or the other of us will lose the several million dollars that each of us has invested, but that is no reason for favoring one or the other. The statute establishes quite different criteria.

On a new tack, our opponents now attempt to slide two rather astonishing factual predicates under the Commission's selection of the Company as a licensee.

One is the notion that the Commission decided that Public Power had not proved qualified for a license, quite aside from the priority versus preference issue, and that we had not challenged these findings (FPC br. p. 72). Just the reverse is true, as we shall show by quotation from the Commission's decision. The Commission reserved all such issues for later consideration if our "decision on priority is adjudged erroneous."

Another new prop is the idea that the Company got the license only because the Company offered the better project; that is, if Public Power's had been the better one, it would have prevailed, despite the Company's permit (FPC br. p. 71). The Commission's brief now says (p. 71, n. 40) that "if the Commission had deemed the Supply System's plans for High Mountain Sheep superior to those of Pacific Northwest and that it was legally and otherwise capable of carrying these out, it undoubtedly would have granted a license to the former agency, despite the latter's priority." That describes our case (except that the permit does

not purport to encompass our project). Public Power designed and proposed a 1.2 million kilowatt project, 30 percent larger than the Company's 875,000 kilowatt plan, and the Commission, on rehearing, found that our larger project was best adapted to comprehensive development. But the Commission licensed our larger project, solely in response to the compulsion of the permit. On this new concession, the case should be reversed, no matter how the preference versus priority issue is decided. (1) Our project has indeed been determined to be the superior one. (2) The Commission has specifically reserved all issues as to Public Power's capability, legal and otherwise, to carry out its plans, and has *not* (as now asserted) decided these against us, or at all. It decided *only* the priority issue, which the Commission's brief now says should not deprive us of our license if we have the capability (not yet determined) to carry out the plan that Public Power, not the Company, proposed, and that the Commission adopted.

Two collateral points deserve comment.

One is the effort to identify the Company as the friend of the fish, Public Power as their enemy. We applied for a license on the Nez Perce project in reliance on the Commission's 1958 decision that this was the only project on the Middle Snake for which it would grant a license, and its statement that fish protection measures appeared quite feasible there. We included about $33,000,000 of fish protection works. When, during the hearing, it appeared that the Commission would reverse itself, we substituted a High Mountain Sheep plan. In it, Public Power refused to accept the Company's premise that the Snake River fishery had been permanently decimated. We included

elaborate fish protection facilities, carefully designed, in our High Mountain Sheep plan; the Company, no designs at all until the Examiner demanded them. Surely, the Commission can and will enforce measures for the protection of the anadromous fish against one licensee as effectively as against another.

The second collateral point is the argument of Oregon and Idaho that they could veto the Commission's selection of Public Power as a licensee, Oregon because she has licensed the Company but will not license Public Power, Idaho because her statute forbids construction of a power project by a foreign municipality but permits such construction by a foreign power company. This Court has answered those arguments.

Time and space do not permit a discussion in this reply brief of all of our points of disagreement. The more important ones are argued briefly below.

II. WHAT ISSUE DID THE COMMISSION DECIDE?

The Commission now says (Br. 72):

"... The Commission also concluded that it was not satisfied as to the Supply System's ability to carry out its plans for a High Mountain Sheep project and that on the basis of the record made it would not award a license to the Supply System (II R. 655). The Supply System has not challenged this latter conclusion."[1]

The Commission's opinion said, to the contrary:

"... If PNPC has a priority under its preliminary permit, it will not be necessary to consider

[1] A footnote adds (p. 71, n. 40):

"If the Commission had deemed the Supply System's plans for High Mountain Sheep superior to those of Pacific Northwest and that it was legally and otherwise capable of carrying these out, it undoubtedly would have granted a license to the former agency, despite the latter's priority."

whether WPPSS would otherwise have a preference under Section 7(a), for that Section only applies 'where no preliminary permit has been issued.' Further, *it is not necessary to resolve other questions relating to WPPSS such as its legal capacity to undertake a project outside of its own state.*" (II R. 641; emphasis added.)

* * *

"*In the event our decision on priority is adjudged to be erroneous, it would be necessary, under Section 7(a), to give WPPSS* [*Public Power*] *a reasonable opportunity to make its plans equally well adapted* to those of PNPC [the Company] and to evaluate such plans following a hearing thereon.

* * *

"Following the hearing on this issue, we would then determine if preference properly accrues to WPPSS, and the effect of such a preference, if any, in the light of all the other factors relevant to a disposition of these applications.[2] *We cannot make such a determination at this time, nor is there any reason to do so in view of our finding that PNPC has priority.* For the same reason, it is unnecessary to resolve the serious question

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[2] Note the curious reversal in the Commission's application of the preference: on rehearing, it will first decide whether Public Power's plans are equally well adapted to the Company's; *then* determine whether preference properly accrues to Public Power. The Examiner had the same notion, saying (I R. 423):

> "The statutory preference does not come into play until and unless a proper application has been filed for a specific plan of development as well adapted as the plans of other applicants."

Of course, the statute requires the reverse order of these determinations. The determination that Public Power is a municipality, hence entitled to a preference, must come first; *then*, if its plan needs revision to make it as well adapted to comprehensive development, it shall have time to do so.

respecting the legal status of WPPSS outside the State of Washington." (II R. 655; emphasis added.)

* * *

"... On the other hand WPPSS has failed to demonstrate any need for such power now or in the foreseeable future. We emphasize, however, that *if it were not for our determination that PNPC has priority under the permit we would give WPPSS further opportunity to show its need for power and its ability to finance,* so that it might show that its project was 'equally well adapted' within the meaning of Section 7(a)." (II R. 661; emphasis added.)

* * *

"... *In the event PNPC is adjudged not to have priority,* it might then be necessary to re-evaluate the Secretary's proposal. This would be particularly appropriate respecting WPPSS since its fortunes are so inextricably intertwined with those of the Interior Department." (II R. 669.) (Emphasis added)

The court below affirmed the Commission on the priority issue only; counsel for neither the Commission or the Company there asserted, as they do here, that the Commission had decided any other issue against us. The court said:

"... This statutory provision [Section 7(a)] undoubtedly gave the Public Power System preference over Pacific Northwest (provided its application met all requirements) if no preliminary permit had been issued." (IV R. 375.)

When the case is reversed and remanded, the chimerical character of the hand-wringing about Public Power's ability to finance a project and market its power will be demonstrated by proof of the issuance

and sale by the Washington Public Power Supply System of $122,000,000 of revenue bonds at an average rate of less than 3.3 percent in 1963 to finance its share of the construction cost of its atomic energy plant at Hanford, Washington. This plant, built and operated by Public Power, is the largest nuclear-fueled power plant in the world. Its power output of 800,000 kilowatts was absorbed without difficulty.

As to our capacity to build and operate a power plant in Oregon and Idaho as a federal licensee, see our response to the briefs of those two States, *infra*, p. 60.

III. DOES THE BEST PROJECT WIN?

The Commission's brief says that the Company got the license because it offered "the best proposal" (p. 71); that "if the Commission had deemed the Supply System's plans for High Mountain Sheep superior to those of Pacific Northwest and that it was legally and otherwise capable of carrying these out, it undoubtedly would have granted a license to the former agency, despite the latter's priority" (Br. 71, n. 40). And it says that "These criteria were applied in this case" (p. 71).

On these premises, the case should be reversed and remanded for application of "these criteria."

Public Power proposed a project 30 percent larger than the Company's—1,200,000 kilowatts vs. 875,000—a difference of 325,000 kilowatts. This is greater than the whole generating capacity serving the cities of Kansas City, Kansas, or Huntsville, Alabama, or Austin and Lubbock, Texas, both together, or Colorado Springs plus all the municipal systems in Colorado.

Three hundred twenty-five thousand kilowatts is roughly equivalent to the peak demand of a population of 500,000 people.

The two proposals, as described by the Examiner, were:

"(9) The High Mountain Sheep project proposed by PNPC includes an arch dam creating a reservoir about 58 miles long with its normal water surface at elevation 1510, providing a gross storage capacity of 3,600,000 acre-feet, of which 2,250,000 acre-feet is usable, and an initial powerhouse installation of 5 turbines, each of 285,000 horsepower at 550-foot head, totaling 1,425,000 horsepower and 5 generators, each of 175,000 kilowatts rating at 0.95 power factor, totaling 875,000 kilowatts.

"(10) The High Mountain Sheep project proposed by WPPSS is located on the Snake River at the same site proposed by PNPC a mile upstream from its confluence with the Salmon River and would include an arch dam creating a reservoir about 58 miles long with its normal water surface of elevation 1510, providing a gross storage capacity of 3,600,000 acre-feet, of which 2,250,000 acre-feet is usable, and an initial powerhouse installation of 6 turbines, each of 290,000 horsepower at 550-foot head, totaling 1,740,000 horsepower and 6 generators, each of 200,000 kilowatts rating at 0.95 power factor, totaling 1,200,000 kilowatts." (II R. 445.)

* * *

"(20) The dependable capacity of the High Mountain Sheep project proposed by PNPC and WPPSS is estimated to be 930,000 and 1,218,000 kilowatts, respectively." (II R. 447.)

The Commission's original opinion, February 5, 1964, approved exactly the smaller project proposed by the Company (II R. 674-75).

Its opinion on rehearing, April 30, 1964, deleted the description of the Company's 875,000 kilowatt power plant, and substituted precisely the description of Public Power's 1,200,000 kilowatt plant (II R. 799-80). It did so with this explanation (II R. 796-97):

> "WPPSS complains that we have ignored the difference between its proposal for HMS and that of PNPC. This is incorrect. However the differences between the two proposals are of such a technical engineering nature that they must await the submission of final plans.
>
> * * *
>
> "However, to avoid any possible ambiguity, we are modifying our order to describe the project works at HMS site; which, on the basis of present information, *we find to be best adapted to a comprehensive plan of development under the test set forth in Section 10(a) of the Act.*" (Emphasis added.)

Is a superiority of 325,000 kilowatts, with all the attendant differences of design of hydraulic and electrical features of the dam and power plant, simply of "a technical engineering nature"?

The rationalization now offered, that while Public Power could design a power plant using six 200,000 kilowatt generators to produce 1,200,000 kilowatts, the Company could not do so because the state of the art limited it to five 175,000 kilowatt generators (FPC Br. 72), simply does not make sense. The Commission approved the Company's smaller power plant in its original opinion, Feb. 5, 1964 (II R. 674), with

Public Power's greater design before it (II R. 615). The majority grudgingly admitted on rehearing that the larger plant we had proposed was the better project (II R. 796), but gave it to the Company in place of its inferior design, solely because it had once granted the Company a permit for a still poorer project at a different site.

Are these the criteria that Congress intended to be applied to defeat the statutory preference? What Congress said, in Section 7(a), was that the municipality should have a reasonable time to make its project as well adapted as the Company's to the comprehensive development of the resource. What the Commission has done is to sustain the priority of the permit by giving the permittee a reasonable time to make its project as well adapted as the municipality's. Yet it concedes (Br. 71, n. 40) that if it had deemed the municipality's plans superior to those of the Company it should have granted the license to the municipality. Ours were superior. It follows that if its present concession is correct—and it is—then its decision was wrong.

IV. PROCRUSTES RIDES AGAIN: THE THREE-WAY STRETCH OF THE PERMIT, APPLICATION, AND NOTICE TO INCLUDE ALL "MUTUALLY EXCLUSIVE" PROJECTS.

Our opponents assert:

The Company (Br. p. 28):

> ". . . [T]he permits contemplated by the Act are permits covering mutually exclusive facilities which would develop essentially the same water resources."

The Commission (Br. p. 86):

> "If the project ultimately licensed must be 'best adapted' under Section 10(a) of the Act, then notice of the application for a preliminary permit for a specified project must also constitute notice of possible alterations of that project within the appropriate stretch of the river that may be required to satisfy the statutory standard."

These are the curves of this circular argument:

1. A company applies for a permit to investigate a second-rate project, avoiding two better but more controversial ones, all well known, that it could have applied for. The Commission gives the required statutory notice of the Company's application to affected states and municipalities.

2. The preference agencies have their eyes on a much better project downstream. It and the Company's choice cannot both be built; they are "mutually exclusive." Public agencies have no interest at all in the Company's inferior upstream project. They are not yet ready to apply for a license on the superior project downstream. They examine the notice they have received, and see that the applicant has carefully limited his claim to the project that they do not want. There is, therefore, no occasion for them to prematurely file a permit or license application in competition with it. They are confident that the inferior project will never be licensed.

3. They are right. The Commission rejects the permittee's subsequent application for a license on the inferior project.

Now the circle of the Commission's new argument begins to rotate:

4. The law forbids the permittee to give up. He must look for a better project.

5. Since the permittee must now seek a better project, his permit is expanded, as a matter of law, nunc pro tunc, without amendment, to include all of the "mutually exclusive" projects that his permit excluded.

6. So the original application for the permit must also be stretched, retroactively, to include the "mutually exclusive" projects.

7. And the notice that the Commission gave public agencies of the limited original application must be retroactively elongated in the same way. It is now discovered that their preference rights to the superior project were cut off *ab initio* by the notice which described only the poor project which did not concern them because it never could qualify for a license.

8. Thus, full circle, the permittee has retroactively enlarged his original priority on Pleasant Valley to include Nez Perce and High Mountain Sheep. The rationale: the lesser includes the greater, not because the differences between the two projects were inconsequential, but for the opposite reason that the two projects were "mutually exclusive."

The argument meets and answers itself.

Is this the protection for public power that Congress wrote into Section 4(f) when it directed that the Commission, "before granting such application [for a permit], shall *at once* give notice of such application in writing to any State or municipality *likely* to be interested in or affected by such application"? (Emphasis added.)

To justify this argument, the Commission makes an extraordinary attack (p. 92-93) on its own Regulation 4.84.

This regulation says that:

> "If an application for an amendment [to a permit] embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application."

This, per Section 4(f) of the statute, means written notice "at once" to the states and municipalities likely to be affected by the project, before the Commission grants such an application. One would suppose that the transfer, proposed here, of a permit from one project to another "mutually exclusive" one—involving twice the area, seven times the reservoir capacity, twice the installed capacity, moving the major storage dam 24 miles downstream below an additional tributary, substituting a dam 415 feet higher than one of the old ones, 136 feet higher than the other—would be just the situation encompassed by this regulation.

But no, we are told, for three antagonistic reasons: (1) the priority of the original permit, by force of law, always included all "mutually exclusive" projects, therefore notice of the one was notice of the right to move to a new "mutually exclusive" site or area, therefore no amendment is needed to move to such a site or area, even if the regulation does say so; (2) contrariwise, this was an inconsequential change; no project is ever built *exactly* (Commission's italics, Br. p. 3) as proposed, and so amendments for changes in dam locations are not required (Br. pp. 91-93); (3) the regulation only says that notice shall be given *if*, not *when*,

an application for an amendment embraces new sites or areas (Br. p. 92). So the permittee need not give any notice at all of his switch unless he makes the embarrassing and unlikely mistake of applying for an amendment.

On this reasoning, amendments of permits are never necessary, in any circumstances, because the change of sites is either (1) so important as to constitute a transfer to a "mutually exclusive" project, and all projects which are "mutually exclusive" are included as a matter of law in a permit for any one of them, or (2) so unimportant as to constitute a minor change which would be approved anyhow—a little adjustment on final fitting, like moving a dam four miles and raising its height 415 feet. Our opponents add a patentable novelty to this paradox by going in both directions at once.

The motivation for this involved logic is quite candidly exposed (pp. 92-93): if notice of a switch to a new "mutually exclusive" project were indeed required to be given to the States and municipalities whose preference rights on the new project are affected, they might assert those rights.

Of course they might. That is why Congress wrote the notice requirement into Section 4(f). That is why it wrote the notice requirement into Section 4(e). That is why the Commission wrote the notice requirement into Reg. 4.84, which the Commission here disowns. That regulation had—until now—a most salutary function. It compelled a permittee to disclose to public agencies, in time for them to assert their objections or their own mandatory preference, the full geographical scope of the priority that he intended to assert against their statutory preference, if indeed he in-

tended to claim more than was disclosed in the statutory notice of the original permit application.

If a public agency, so warned, protests the amendment of the permit, the regulations contemplate a hearing (Reg. 4.83). If the Commission decides that the amendment is of a minor sort, not affecting the rights of third parties (such as the preference rights of public agencies), it should be granted. If—as here—it involves the selection of a wholly new "mutually exclusive" project, it should be denied, and the applicant directed to file a new permit application.[1] Nevertheless, exactly that sort of impermissible substitution is accomplished by this decision, ex post facto, retroactively nullifying the public preference on a "mutually exclusive" project without notice or hearing.

V. DID THIS PERMIT "ON ITS FACE" INCLUDE HIGH MOUNTAIN SHEEP?

The assertion (Company's br., p. 37):

> "It is clear *on the face of the permit itself* that it was meant to apply to mutually exclusive facilities developing the Middle Snake River, and not only to the single alternative provisionally described by Pacific Northwest in its permit application." (Emphasis added.)

Did the permit "on its face" show that it was meant to apply to the High Mountain Sheep project? Does it merely "provisionally describe" the Pleasant Valley project?

This is a third head for Cerberus: the first reason given for the constructive inclusion of High Mountain

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[1] In Regulation 5.1, the Commission spells out criteria for testing whether an amendment to a license is required.

Sheep in the Pleasant Valley permit was the odd one that because the two projects were "mutually exclusive," a specific permit for one implies the obligation, hence the right, to investigate the other. The second was the reverse argument, that the switch to High Mountain Sheep was just the usual minor adjustment: projects are never built *"exactly"* as proposed (the Commission's emphasis: Br., p. 3). The third and present try is that High Mountain Sheep was there right along, on the face of the permit.

Let us examine this new visage.

There are three features to it, the application, the notice, the permit itself. The permit recites the first two.

(1) The Company's Application

The Company now says (Br., p. 8):

> ". . . Pacific Northwest applied for a preliminary permit . . . to enable it to conduct investigations necessary to determine what precise projects would be best adapted to a comprehensive plan for improving and developing the Snake from the Salmon to Hells Canyon, and in the meantime to maintain priority of application for a license to construct such projects when the best development plan finally had been determined (I R. 141-50)."

This is wishful thinking. What the application in fact said was this (I R. 141-45; emphasis added):

> "1. Pacific Northwest Power Company, . . . desiring to obtain a license under the Federal Power Act, hereby makes application to the Federal Power Commission for a preliminary permit for thirty-six months for the project described herein.
>
> * * *

"6. The location of the projects applied for is as follows:

* * *

"(b) Mountain Sheep and Pleasant Valley Projects in Idaho County, Idaho, and Wallowa County, Oregon.

* * *

"8. The Mountain Sheep dam would be a concrete arch dam with a top elevation approximately 1108 feet above mean sea level. The reservoir will be approximately 20.6 miles long with backwater reaching to the Pleasant Valley site. The powerhouse would be a reinforced concrete structure with provision for installation of 250,000 kilowatts of generation capacity. Estimated average annual output will be 1,120,000,000 kwh alone, 1,160,000,000 kwh with Pleasant Valley, without regard to the effect of other possible upstream dams in the Snake River.

"The Pleasant Valley dam would be a concrete arch dam with a top elevation of approximately 1475 feet above mean sea level. The reservoir will be approximately 34 miles long and will contain approximately 850,000 acre feet of storage capacity, of which approximately 300,000 acre feet will be usable for power, flood control, and other beneficial uses. The Pleasant Valley powerhouse would be a reinforced concrete structure with provisions for installation of 600,000 kilowatts of generating capacity. Estimated average annual output will be 2,510,000,000 kwh without regard to the effect of other possible upstream dams in the Snake River.

* * *

"10. The following exhibits are submitted herewith:

* * *

"H and I. General map of Proposed Projects, Sheets 1 and 2."

The map, in two sheets, appears in the record at I R. 149-50. As required by Reg. 4.82, this map shows

"the approximate project boundary of the area to be occupied by the principal project works, such as, dams, reservoirs, forebays, waterways, and powerhouses, but excluding transmission lines . . . ."

An examination of this map, which shows project boundaries which deliberately exclude High Mountain Sheep by 3.7 miles, Nez Perce by 5 miles, should explode the present assertion that the Company applied for a permit "to determine what precise projects would be best adapted to a comprehensive plan for improving and developing the Snake from the Salmon to Hells Canyon." (Company br. p. 8.) It applied for Pleasant Valley-Low Mountain Sheep, period; this project was not just "provisionally described," it was firmly specified.

(2) The Commission's Notice

When the Commission received the foregoing application, Section 4(f) of the Act required that the Commission "before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and . . . publish notice of such application . . . in the county or counties in which the project or any part thereof or the lands affected thereby are situated."

The Commission did this December 16, 1954 (II R. 810). Its notice was even more specific than the Company's application. It said:

> "Public notice is hereby given that application has been filed under the Federal Power Act . . . by Pacific Northwest Power Company . . . for preliminary permit for proposed Project No. 2173, consisting of two proposed water-power develop-

ments designated as Mountain Sheep and Pleasant Valley, to be located on Snake River in Idaho County, Idaho, and Wallowa County, Oregon, . . . and described respectively as: Mountain Sheep, comprising a concrete arch dam with top elevation of about 1108 feet (m.s.l.) located at river mile 192.6 in SE ¼ Sec. 30, T. 29N., R. 3W., B.M., Idaho, and SE ¼ Sec. 18, T. 4N, R. 49E., W.M., Oregon, creating a reservoir extending about 20.6 miles to the Pleasant Valley site; a powerhouse with provisions for installation of 250,000 kilowatts of generating capacity; and appurtenant facilities; and Pleasant Valley, comprising a concrete arch dam with top elevation of about 1475 feet (m.s.l.) located at river mile 213.2 in NW ¼ Sec. 29, T. 27 N., R. 1W., B.M., Idaho and SW ¼ Sec. 17, T. 2N, R. 51E, W.M., Oregon, creating a reservoir extending about 34 miles to Hells Canyon dam site containing about 850,000 acre-feet of storage capacity of which about 300,000 acre-feet will be usable for power, flood control, and other beneficial uses; a powerhouse with provisions for installation of 600,000 kilowatts of generating capacity; and appurtenant facilities.

"Protests or petitions to intervene may be filed with the Federal Power Commission, Washington, D. C. . . ."

The maps opposite page 3 of our opening brief show, in red, these dams at the stated locations, these reservoirs at the stated elevations. The Commission's staff had defined the "Project" even more tightly than the Company had. Does this read as though the Commission, at that time, had construed this application as encompassing the other two "mutually exclusive" projects, Nez Perce and High Mountain Sheep, which would flood the additional areas shown in blue on our maps? Should a public agency which

received this notice have read it as demanding a priority on those two excluded projects, which would forever nullify the public preference on them? Could the Commission, in the teeth of Section 4(f), and having given this specific notice, have thereupon issued a permit which "on its face" included Nez Perce and High Mountain Sheep? The question answers itself. If it could not then lawfully issue a permit which explicitly included those projects, it cannot now add them by implication.

(3) The Commission's order issuing the permit

It will be recalled that the exact language of Section 7(a) orders the public preference to be recognized "where no preliminary permit has been *issued.*" The Commission "issues" a permit by formal order, reciting findings. We think Congress intended that public agencies should be able to discover, from comparing an order issuing a permit with a subsequent license application, to see whether the one included the other. The only order issued in this case appears at I R. 151-64.

It recites (I R. 151; emphasis added):

> "As described in the application, *the proposed project*[1] *would consist of two water-power de-*

[1] "Project," as the word is used throughout this order, necessarily has the meaning defined in Sec. 3 of the statute. This is precise and specific:

> "(11) 'project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or

(Continued to next page)

velopments designated as Mountain Sheep and Pleasant Valley and described respectively as . . ."

(here follows the description contained in the application, but adding, from the statutory notice, the locations of the dams by reference to the public land surveys and to nearest tenth of a river mile, and the reservoir elevations).

The recitals continue for three pages (I R. 152-154) of summaries of reports of federal agencies on "the proposed project," "the two proposed dams," "the two dams," "the flood control storage" in the "Pleasant Valley Reservoir," and so on. It refers to "Federal plans for *development of the two power sites* as initially investigated by the Corps of Engineers and the Bureau of Reclamation" (meaning the 1954 report) and says that these "indicate that the proposed project has engineering feasibility," and so on (I R. 154). It continues, "since *the two developments* would be located immediately downstream from the Hells Canyon site, the costs, operation, and characteristics of certain features of *the two dams* will depend upon the ultimate development of the Snake River at and above the Hells Canyon site." (Emphasis added.)

The order continues (I R. 154):

"The permit issued herein does not authorize construction of the proposed project—being for

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with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

"(12) 'project works' means the physical structures of a project;"

> the sole purpose of maintaining priority of application for a license for the project under the terms of the Federal Power Act."

Does any of this read like a permit that was meant *"on the face of the permit itself"* to apply to any project other than the one so meticulously described?

The order continues with formal findings (I R. 154-55):

> "The Commission *finds:*
>
> * * *
>
> "(3) Public notice of the application has been given as required by the Federal Power Act . . ."

This finding, in view of the notice actually published (*supra*) could not have supported an order granting a permit for Nez Perce and High Mountain Sheep, and of course the Commission did not issue any such order.

It said, instead (I R. 155):

> "The Commission *orders:*
>
> "(A) This preliminary permit is issued to Pacific Northwest Power Company . . . for the sole purpose of maintaining priority of application for a license for Project No. 2173. . . ."

Here follow special Articles 9-15 (I R. 156-57), requiring: (9) reports, at six month intervals, on work done; (10) cooperation with the Forest Service in alleviating damage to forest resources "affected by the proposed project"; (11) cooperation with Federal and State authorities concerned in inclusion of measures "in the projects" in the interest of fish and wildlife conservation; (13) cooperation with Federal and

State agencies with respect to recreational phases "of the project"; (15) cooperation "with the U. S. Corps of Engineers and the Bureau of Reclamation with the object of determining a *plan of development for the two sites* best adapted to a comprehensive plan of development of the water resources of the Snake River." (Emphasis supplied.)

The additional Articles, 1-8, are standard terms and conditions of all preliminary permits (I R. 159-64). The point need not be labored that these, throughout, confirm the standard practice of relating a permit to a specific project, at a specific site. See *e.g.,* Art. 1 (I R. 160), referring to "plans, specifications, estimate of cost, and other information *for a full understanding of the proposed project"* including such data as (1) foundation explorations *"for the project structures."* Art. 2 warns that a license will be issued "for the proposed project only if in the judgment of the Commission said project will be best adapted to a comprehensive plan for the improvement and utilization *of the site. . .*" (I R. 161). It goes on to say that in making this determination "the Commission will consider, among other things, whether the maps, plans, and specifications are such . . . that full, practicable utilization will be made of the water storage possibilities, and the head *at the site to be developed."* (Emphasis added.)

There is more of the same specificity. The permit refers to this specific "project," No. 2173, some 21 times, to specific sites, or specific developments, or specific dams, 5 times, and never to any other project.

This, then, is the "face of the permit." Is it, then, "clear . . . that it was meant to apply to mutually exclusive facilities developing the Middle Snake River, and not only to the single alternative provisionally

described by Pacific Northwest in its permit application"?

The question answers itself.

Even if Rembrandt painted motorcycles (*supra*, p. 3), he didn't paint this one.

VI. CONGRESS REFUSED TO RESTRICT THE PUBLIC PREFERENCE TO THE PERMIT STAGE: TO THE CONTRARY, IT RESTRICTED THE PERMITTEE'S PRIORITY, AT ALL STAGES, TO THE PROJECT IDENTIFIED IN THE PREREQUISITE NOTICE TO PUBLIC AGENCIES.

The assertion (Company pp. 33-34):

> ". . . The Congress determined that competition between prospective licensees should be at the beginning of proceedings, before the issuance of the preliminary permit, rather than at the later licensing stage. That is true even when the competing prospective licensee is a preference applicant." (See also p. 53.)

P. 55:

> "Under the Commission's approach, if some public agency had wished to secure a license for one of the three projects on the basis of preference, it was obliged to move when Pacific Northwest applied for a permit and take on the expense of investigation itself."

The answer, from the legislative history:[1]

The legislative history shows that utility spokesmen urged on Congress language to do exactly this, and

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[1] The Federal Water Power Act, now Part I of the Federal Power Act, was enacted as the Act of June 10, 1920, 41 Stat. 1063, in the 66th Congress. It was preceded by bills in the 63rd, 64th, and 65th Congresses, some of which passed both houses but failed of approval of conference reports. The Act acquired its present format in the 65th Congress, in 1918. For background, see H. REP. No. 715, 65th Cong., 2d Sess. 13-15 (1918).

Congress rejected it, deliberately taking the advice of public ownership advocates who insisted that the preference should be capable of assertion at either permit *or* licensing stage.

Three other troublesome problems of balancing the interests of permittees and preference agencies were solved, adversely to the contentions of utility spokesmen, by (1) making the preference mandatory, instead of discretionary; (2) deleting language which implied that a permit conveyed an option on a license; (3) restricting the permit, hence its priority, to the project described in a statutory notice to public agencies, patterned on the notices which initiate priorities under the western water and mining laws. This is the touchstone for testing the magnitude of the resource preempted.

These were the decisive colloquys and decisions in Congress:

1. Congress refused to restrict the public preference to the permit stage.

In 1918 the Wilson administration sent to Congress a draft of bill, in the format now appearing in the Act. This draft, amended, as reported out by the House Water Power Committee, left the matter of granting a preference to public agencies to the Commission's discretion.[2] The question arose whether this preference should be asserted at the permit stage or the licensing stage. The discussion was interwoven with argument over whether the preference should be discretionary or mandatory.

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[2] H. REP. No. 715, 65th Cong., 2d Sess. (1918).

Mr. Pierce, a utility witness, proposed:[3]

> "... I therefore suggest that the word 'licenses' in line 3, page 13, section 7, be stricken out and the words 'preliminary permits' be inserted in its place. This would not deprive the municipality of the preference intended by the bill but would simply transfer the preference so that it would have to be allowed or exercised at the very beginning of the enterprise as it should be."

Mr. Kelley, another utility witness, testified:[4]

> "Section 7 contains an objectionable feature, in my opinion, in the following language:
>
> " 'That in issuing licenses hereunder the commission may in its discretion give preference to applications for licenses by States and municipalities.'
>
> "Now, no one will contend that a State or a municipality should not have a preference right, as distinguished from the right of a private corporation. That we concede, but that right should be determined at the time of issuing the preliminary permit and not at the time of a hearing on the license."

Public power advocates took the opposite position: that the preference should be available at both the permit and licensing stage. Mr. Mathews, counsel for the Los Angeles Department of Water and Power, proposed:[5]

> "The next amendment is one affecting page 13, and is: Strike out the words 'may in its discre-

[3] Hearings before the House Committee on Water Power, 65th Cong., 1st Sess. 161 (1918).

[4] *Id.*, p. 298.

[5] Hearings, House Committee on Water Power, 65th Cong., 1st Sess., 385-86 (1918).

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tion,' in line 4, and in place thereof insert the word 'shall.' With this change the language would be:

"'That in issuing licenses hereunder, the commission shall give preference to applications for licenses by States and municipalities—etc.'

"MR. RAKER. What page is that last one?

"MR. MATHEWS. Page 13, line 4. The point of the suggested amendment is this: That in issuing licenses the commission, instead of having the discretion to give preference to States and municipalities, shall be required to give such preference.

"MR. ESCH. Mr. Pierce suggested an amendment by striking out the word 'licenses' in that third line and substituting 'preliminary permits.'

"MR. MATHEWS. My suggested amendment would affect that then in that form, requiring the preference to be given to the State or municipality by the commission, whether it is the license or the permit."

He was cross-examined on this:[6]

"MR. ANDERSON. Mr. Mathews, where two applications for a permit were made simultaneously, one by a municipality and one by a private corporation, or an individual, do you think the preference should there be given to the municipality?

"MR. MATHEWS. Yes, sir.

"MR. ANDERSON. Suppose that the permit was originally given to a corporation, and subsequently a municipality made application for it, would you in that case think that the municipality ought to be given preference?

"MR. MATHEWS. Well, Mr. Anderson, you were asking for my view upon the point. I should say, yes.

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[6] *Id.*, p. 389.

"MR. ANDERSON. That is all I wanted to get, your viewpoint, of course."

Congressman Barkley (later Senator and Vice President) summed it up this way:[7]

"MR. BARKLEY. I doubt seriously as between these municipalities and States and any private corporation whether there ought to be any preliminary permit or whether any right obtained under preliminary permit should operate as against the right of the community. For instance, it may take four or five months or it may take one month for a municipality, which, of course, operates slowly. It has either a city council or commission form of government, and there are certain legal technicalities that must be gone through with after this law becomes effective before, perhaps, they would be able to start to get a license from the commission. While they are going through these preliminary steps that make their investment legal, as you gentlemen who are lawyers well know, some corporation may come in and get a preliminary permit, and if that preliminary permit is to operate against the right of the municipality to act later, then the effect of changing these words [from "may" to "shall"] would be almost nullified."

* * *

"MR. BARKLEY. Here is what I was trying to illustrate: We will assume any given city has not the right to invest money in water power or a municipal plant. It may require either action by the city authorities or perhaps submission of that question to the vote of the people. In the meantime, however, the city is not in a position to take any step before the commission. It can not warn the commission it is going to make application for a permit, because it does not know whether

[7] *Id.*, p. 817-18.

it is or not; and while it is in that helpless condition some private enterprise comes in and because there is no opposition and there is no competition that the city can put up as against them the private enterprise gets the permit."

Mr. Mathews' view was to prevail. Here are Congressman (later Senator and Vice President) Barkley and Mr. Taylor of Colorado, in a discussion of it:[8]

"MR. BARKLEY. If anything is done that is going to delay development of water power either by private corporations or cities, I think that the benefit of the doubt should be given to the community at large. In other words, if either one is going to be tied up, I would very much prefer to see private enterprise tied up than to see the municipality or community tied up for 50 years or indefinitely.

"MR. TAYLOR. Let me make a suggestion to both of you. I think this committee ought to first determine this one question: Whether or not we are going to gives States and municipalities preference, I think the committee ought to determine whether we are going to try to carry out Mr. Mathews' ideas by giving States and municipalities a prior right to use water power. If we are going to do that, let us do it in good faith and do it in such a way that they can get it; and, if not, let us say so and leave the bill as it is."

The Committee did not accept the utilities' proposal to restrict the preference to the permit stage. The Pierce-Kelly amendments never appeared in any bill reported out by any committee, and were never offered on the floor.

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[8] *Id.*, p. 821.

2. The preference was made mandatory, not left to the Commission's discretion.

When the Administration bill reached the House floor, it was amended to make the preference language mandatory. Rep. Doremus, author of the amendment, explained that it:[9]

> "... makes it mandatory upon the Commission to grant the license to the State or municipality, if the plans submitted by it are, in the judgment of the Commission, as good as those submitted by the private applicant."

The directive remained mandatory through the remainder of the 65th Congress, was embodied in Section 7(a) of H.R. 3184 in the 66th Congress, and enacted in its present form.

A corollary amendment was adopted to preserve this preference even if the public agency's project was less well adapted to comprehensive development of the waterway than the competing project of a nonpublic license applicant, provided that the public agency's plan could be made equally well adapted, within a reasonable time to be fixed by the Commission.[10]

The underlying philosophy was forcefully stated by Representative Sinnott (58 CONG. REC. 2037-38 (1919)):

> "I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think if the municipality or

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[9] 56 CONG. REC. 9804 (1918). There were similar sentiments expressed in the Senate. See, *e.g.*, the colloquy between Senators Walsh and Borah. *Id.* at 10484.

[10] 58 CONG. REC. 2037-38 (1919).

> the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that opportunity to modify and amend its plan and make it as good and as efficient as any other plan filed."

3. Congress deleted language which was construed by utilities as giving a permittee an option on a license.

This point requires us to look forward to 1935, when Congress amended Section 5, deleting language which some witnesses in 1918-19 thought gave a permittee an option on a license. (This becomes important when we turn shortly to the Merrill-McLaughlin colloquy so heavily relied upon by our opponents.)

The Public Utility Holding Company Act of 1935, incorporating the Federal Water Power Act as Part I of the new Federal Power Act (Title II of the 1935 enactment), amended Section 5, changing the sentence, "Each such permit shall set forth the conditions under which priority shall be maintained and a license issued," by deleting "and a license issued."[11]

The report of the House Committee on Interstate and Foreign Commerce explained:[12]

> "This section amends section 5 of the Act. In the sentence providing that preliminary permits shall set forth the conditions under which priority can be maintained 'and a license issued,' the

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[11] § 203, 49 Stat. 841 (1935).

[12] H. REP. No. 1318, 74th Cong., 1st Sess. 23 (1935). See, to the same effect: testimony of the Solicitor of the Commission, *Hearings on S. 1725 Before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess. 236 (1935); S. REP. No. 621, 74th Cong., 1st Sess. 43-44 (1935).

quoted words are eliminated. A preliminary permit is obviously not intended to carry the right to a license even if the applicant complies with all the conditions of the permit. Omission of these words is calculated to make entirely clear what was undoubtedly the original intention of the law in this regard."

The Senate Committee on Commerce said:[13]

"... In the sentence providing that such permits shall set forth the conditions under which priority shall be maintained 'and a license issued,' the quoted words are stricken out. It was plainly not the intent of the act to have a preliminary permit carry the absolute right to a license, even if the applicant complies with all the conditions of the permit. The quoted words, however, are relied upon in support of the contention that a permit does carry that right. Omission of those words is calculated merely to free the issue from doubt."

4. Congress restricted the priority conferred by a permit, as against the public preference, to the project described in a statutory notice to public agencies.

The solution to the conflict between the public preference, and the protection demanded for permittees, involved two steps: an amendment to Section 7(a), and a new section prescribing the notice to public agencies which was required to define the permittee's priority protection.

(1) *The language in Section 7(a) "where no preliminary permit has been issued" was proposed at a time when the public preference language of Section 7(a) was still discretionary, not mandatory, and when Section 5 contained language (later repealed) which*

[13] S. Rep. No. 621, 74th Cong., 1st Sess. 43-44 (1935).

implied that a permit conferred a mandatory right to a license.

Mr. O. C. Merrill, Chief Engineer of the Forest Service, testified as follows on the potential conflict between the (then) implied preference to permittees in Section 5 and the (then) discretionary preference to public agencies in Section 7(a):[14]

> "MR. MERRILL. The preliminary permit will state the conditions under which the license will be granted, and if the permittee complies with the conditions he gets the license.
>
> "MR. PARKER. *It is an option?*
>
> "MR. MERRILL. Yes, sir. In section 7 is the preference clause for licenses which gives the *discretion* to the commission to prefer any municipality over a private applicant, but it was intended that the *mandatory* language of section 5 should control the *permissive* language of section 7 in case the preliminary permit was already in existence." (Emphasis added.)

In both respects, Congress reversed Mr. Merrill's premises. Congress made the preference to public

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[14] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 55 (1919). (Emphasis added.) Sections 7 and 5 in the administration bill contained the following relevant language at the time of Mr. Merrill's testimony (H. REP. No. 715, 65th Cong., 2d Sess. 14-15, 23, 24, 33 (1918):

> "Sec. 7. That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation and water resources of the region; . . ."
>
> "Sec. 5. . . . Each such permit shall set forth the conditions under which priority shall be maintained and a license issued. . . ."

agencies mandatory instead of permissive, and in 1935 it deleted the language from which Mr. Merrill inferred that the permit gave the permittee a mandatory option on a license.

At the conclusion of Mr. Merrill's testimony, he offered an amendment to Section 7(a), to insert, after the language giving the Commission discretionary power to give preference to public agencies, the qualification "where no preliminary permit has been issued."[15] The Committee did not include Mr. Merrill's suggestion in S. 1419 as reported.[16] The bill as passed by the House September 5, 1918, did not contain that language.

S. 1419 as amended by the House went to conference. Mr. Merrill's language appeared for the first time in the conference report,[17] although neither house had approved such an amendment. The report gave only the following explanation of this change, among others, in Section 7:[18]

> "... after the word 'licenses' the words 'where no preliminary permit has been issued' are inserted, ... Your committee thought these changes were in the interest of clarity."

When the House considered this conference report, Representative Sims, chairman of the House Com-

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[15] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 116 (1919). (Emphasis added.)

[16] H. Rep. No. 715, 65th Cong., 2d Sess. 5, 16 (1918).

[17] H. Rep. No. 1147, 65th Cong., 3d Sess. 5 (1919).

[18] *Id.* at 16.

mittee on Water Power, and of the House conferees, told the House that:

> "... the bill as agreed to in conference, so far as the fundamental provisions of the bill are concerned, so far as any question of principle is concerned, is practically in all respects just as it passed the House." (57 CONG. REC. 4636 (1919)).

The House adopted the conference report (*id.* at 4640-41), but the Senate failed to act on it.

There is nothing in the legislative history to suggest that Mr. Sims was wrong or that the House, by adopting this language, intended to undo its careful strengthening of the public agency preference, which it had just made mandatory instead of discretionary, and which it had buttressed in other respects.

And there is nothing to suggest that the conferees intended to give the proponents of the permit more than they had earlier proposed but the House had rejected, namely, a "preference right to lease the lands *embraced in the permit.*"[19] (Emphasis added.)

This conference report was the basis of H.R. 3184 in the 66th Congress, which enacted it. But there was no discussion of this language in either house in that Congress.

(2) *Concurrently, the House was proceeding to define and restrict the priority conferred by Section 5 on a permittee.* It did so in two respects:

(a) Congress finally decided that permits might be issued to several competitors for the simultaneous examination of a single site, negating the implication

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[19] H. REP. No. 842, 63rd Cong., 2d Sess. 2 (1914), had proposed such a preference to permittees. It was never adopted.

that a permit gave an exclusive right of occupancy, even upon the project named in the permit, and, a fortiori, forbidding any such implication with respect to a "mutually exclusive" site outside the area embraced in the permit.

(b) Congress limited the priority to the project defined in a public notice to preference agencies, describing the project upon which a permit (hence a priority) was asked.

As to the exclusive right of occupancy:

(1) *Congress amended Section 4(f) to avoid conferring an exclusive right of occupancy on a single permittee, even with respect to a single specified site.*

The first Ferris bill (H.R. 16673, 63rd Cong.) reported out in 1914, had authorized the Secretary of the Interior to issue preliminary permits for "the occupation of public lands valuable for water-power development for a period not exceeding one year" and had provided that the permittee "upon filing an application for lease prior to the expiration of the permit period shall be entitled to a preference right to lease *the lands embraced in the permit,*"[20] a provision later deleted. (Emphasis added.)

Subsequent consideration of the bill proceeded on the assumption that the preliminary permit would relate to a particular project. For example, in the 63d Congress Rep. Mann secured an amendment broadening the language in § 1, authorizing the issuance of preliminary permits, to make "permit" plural "in order that more than one man or more than one

[20] *Id.*

concern might investigate the power possibilities of a particular place." (51 CONG. REC. 13800-01 (1914).)[21] Efforts of utility spokesmen to delete the Mann amendment failed.[22]

The legislative history makes it emphatically clear that Congress meant what it said, in directing that more than one permit could be issued to competitors *for the examination of the same site*—the antithesis of the present notion that a permit to one company for the examination of one site gives it an exclusive priority to a license not only on that site but on all "mutually exclusive" competitive projects affecting the same reach of the river.

In 1918, during the 65th Congress, Mr. Kelley, a utility witness, objected to this feature of the bill,[23] first adopted four years earlier. He said:

> "Under section 5 I believe that there is no exclusive right given to any preliminary permittee. As many permits may be issued as in the discretion of the executive officer or the commission may seem desirable. I think it should be provided that when a preliminary permit has been issued such preliminary permit shall carry with it the right of exclusive possession until the permittee has had an opportunity of doing the work and con-

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[21] The Mann amendment was retained in the Senate version of the bill. S. REP. No. 898, 63rd Cong., 3rd Sess. 4 (1915). It was embodied in § 1 of the second Ferris bill in the 64th Cong. (H.R. 408; S. REP. No. 66, 64th Cong., 1st Sess. 1 (1916)), carried over into section 4(e) (now 4(f)) of the administration bill in the 65th Congress (H. REP. No. 715, 65th Cong., 2d Sess. 23, 32 (1918)), and enacted. 41 Stat. 1066 (1920), 16 U.S.C. §797(f) (1958).

[22] 51 CONG. REC. 13801 (1914).

[23] *Hearings, House Committee on Water Power*, 65th Cong., 1st Sess. 297-98 (1918). See also, *ibid.*, pp. 57-58.

forming with the reasonable conditions of the permit. Otherwise there may be created an unsatisfactory situation. If a half dozen preliminary permits may be issued for the same proposed development, no feeling of security or of protection, so far as the ultimate issuance of the license is concerned, will follow.

"It is therefore my suggestion as a practical propcsition that section 5 should provide that the preliminary permit should carry an exclusive possessory right, pending such a reasonable time as would give the permittee an opportunity to comply with the conditions upon which the permit was issued. The particular conditions being left to the discretion of the commission would hardly be the subject of abuse."

His proposal to amend Section 5—the only section conferring "priority" on a permit—was not adopted by the Committee, and was never offered on the floor.

"Permits" remained plural, and so appears in Section 4(f) today.

(2) *To protect the preference rights of public agencies, the Commission's authority to issue preliminary permits was subjected to a condition precedent, issuance by the Commission of prior written notice to the agencies likely to be affected by the proposed project.* These requirements of notice were expanded to require publication in the counties in which the lands affected by the project are located.

The key to solution of the troublesome problem of balancing the equity of the permittee against the preference of the municipality was found in the notice pro-

visions of the mining and water laws of the west, from which the Federal Power Act was derived.[24]

Senator Walsh first called this problem to the attention of the House Committee in 1918, during consideration of the administration bill (S. 1419, 65th Cong.), which was the predecessor of that enacted in 1920:

> "In practically all of the public lands legislation provision is made in the law under which the applicant is required to give notice of his purpose to apply for a patent to the lands, title to which he seeks. No provision of that kind is found in this bill, and it occurs to me that it would be eminently advisable not to make a grant of these permits or licenses, which in some instances at least may be exceedingly valuable, without giving everybody who desires to compete for them an opportunity to present his claim."[25]

Senator Walsh was on firm ground.[26]

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[24] See testimony of O. C. Merrill, Chief Engineer of the Forest Service, *Hearings of the House Committee on Public Lands* on H.R. 14893, 63rd Cong., 2d Sess. 373-74 (1914).

[25] *Hearings on Water Power Before the House Committee on Water Power*, 65th Cong., 2d Sess. 834 (1919).

[26] 2 KINNEY, IRRIGATION AND WATER RIGHTS, pp. 1229-30:

> "§ 715. Notice—Limits the extent of the water right claimed.—Another effect that a notice has is in limiting the right of the appropriator to the amount of the water claimed in the notice. It is the settled rule that an appropriator under one appropriation depending upon a notice can claim no more water than is called for in the notice. As all the waters are open to appropriation by successive appropriators this rule is necessary to ascertain the claims of those who are prior."
>
> • • •

Id., p. 1551:

> "In most cases the notice is sufficient to fix the maximum rights of the appropriator. He can not take any more water than is called for in the notice, but he may be compelled to take less, if he does not put all of the water claimed in the notice to a beneficial use."

The House Committee reported the bill, with amendments,[27] but without Senator Walsh's proposal. On the floor, Representative Sinnott moved to amend Section 4(e) (now Section 4(f)) by adding the following proviso.[28]

> "*Provided, however,* That upon the filing of any application for a preliminary permit by any person or corporation the commission before granting such application shall at once give notice of such application, in writing, to any State or municipality likely to be interested in or affected by such application, and shall also publish notice of such application for four weeks in a daily or weekly newspaper published in the county or counties affected by said application."

Mr. Sinnott explained the purpose of his amendment as follows:[29]

> "Mr. Chairman, subdivision (e) of section 4 is the subdivision relative to preliminary permits. In section 7 it is provided that in issuing preliminary permits in the discretion of the commission preference may be given to States or municipalities. It is well known, however, that municipalities and public officials are often very dilatory and that they sleep upon their rights. It seems to me it is wise to provide that as soon as an application is filed by any person or corporation that notice shall be at once given to the various municipalities, which mean the county, city, irrigation district, drainage district, or other political division of the State. Notice to them that an application for the preliminary permit has been filed should be given. This will bring knowledge directly home to the State or the county or the city officials and give them an opportunty to present

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[27] H. REP. No. 715, 65th Cong., 2d Sess. (1918).

[28] 56 CONG. REC. 9762 (1918).

[29] *Ibid.*

their application if they desire public or municipal ownership, where otherwise the matter would be entirely overlooked and snap judgment would be taken against them, and they would be foreclosed from filing application."

Representative Raker further pursued the question of whether the notice provisions were adequate to protect both public agencies and others (such as homesteaders) interested in the lands affected by the proposed permit.[30]

"Mr. RAKER. Mr. Chairman, this amendment provides that before action is taken to grant the preliminary permit to any person or corporation the commission, before granting it, shall at once give notice of such application in writing to any State or municipality likely to be interested or affected by such application.

"How are you going to tell whether they are likely to be interested? The purpose is to give general notice to the public, and I am asking the committee if they believe this is a sufficient notice to be given on a matter of this kind.

* * * *

". . . The committee will remember that this was one of the things that Senator WALSH appeared before the committee and argued and asked it to especially consider and place in the bill."

Rep. Anderson then moved to amend Rep. Sinnott's designation of where notice should be published to read as follows:[31]

". . . in the county or counties [affected by said application] *in which the project or any parts thereof or the lands affected thereby are situated.*"

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[31] 56 CONG. REC. 9762 (1918). (Deletion bracketed, addition italicized.)

[30] *Id.*, at 9763.

Rep. Anderson's language was accepted by Rep. Sinnott and the Sinnott amendment, so modified, was adopted.[32]

The Commission now concedes that its regulations require that an application for a permit contain a description of a specific project (Br. 89), but argues (1) that the specificity goes no further than the indication of an approximate or tentative project boundary, and (2) while specificity in the description of a project and its boundaries is required by the words in Section 24 (relating to land withdrawals), which read: "any lands of the United States included in any proposed project," nevertheless specificity in the description of the same project and its boundaries is not required by the counterpart language in Section 4(f) (relating to publication of notice), which reads: "in which the project or any part thereof or the lands affected thereby are located" (Br. 89-92). Two quite different geographical scopes are thus attributed to the two carbon copies of the same notice which Reg. 4.81 requires the Commission to send out pursuant to Sections 24 and 4(f): one copy to the Secretary to effect withdrawals under Section 24 against locations and entries, the other copy to pubic agencies and local newspapers, to effect withdrawals as against the preference right accorded by Section 7(a). It would require discovery of some rather unusual legislative history to support the contention that Congress intended such a "two scope" construction of the one notice and the permit, in the teeth of the parallel language in Sections 4(f) and 24. It has not been produced; as we have seen, the legislative history is all the other way.

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[32] *Ibid.*

VII. THE DEAD PERMIT: RES JUDICATA OR RESURRECTION?

The issue of transferability of the permit priority to High Mountain Sheep was decided against the Company in 1958, in an unappealed Commission decision, and cannot be relitigated now.

The Company's brief (p. 58, n. 28) confirms that:

> (1) the Commission rejected the Pleasant Valley application on the ground that Nez Perce was the superior plan of development;
>
> (2) the Company (on rehearing) asked the Commission to consider the substitution of a high storage dam at High Mountain Sheep as better adapted to a comprehensive plan of development than Nez Perce would be. However, the Commission denied those requests (II R. 855-865).

It could have added that:

> (3) the ground that the Company gave for these requests on rehearing was that "the Commission failed . . . to protect Applicant in its priority right to undertake a project best adapted to a comprehensive plan . . . at least one alternative, a High Mountain Sheep dam at a site between the Salmon and Imnaha, was not included in the Commission's consideration, and opportunity must therefore be accorded to determine the place of that project within a comprehensive plan that meets standards of the Commission." (II R. 857).

The Company might also add that:

> (4) the Commission rejected this application for rehearing on April 11, 1958 (II R. 863), *after*

the Company's present license application of March 31 had come before it.

The Commission thus denied the Company's motions which would have substituted High Mountain Sheep for the project described in the license application (and permit). The Commission did so in the face of the Company's argument that such action was necessary to preserve the Company's priority under its permit. The grounds of the decision—not dicta—were that any project which excluded Nez Perce was inferior. This denial of an application to substitute one project for another, on the ground that both were mutually exclusive of Nez Perce, had exactly the same effect as a denial of an amendment of the permit to add this new "site or area." A new permit for the new site was needed if the public preference was to be precluded by issuance of a permit.

The issue then decided—against reincarnation of the permit's priority to protect a new High Mountain Sheep license application on a "mutually exclusive" project—is the precise issue relitigated here. The Company did not seek judicial review under Section 313(b). If ever a precise issue acquired "statutory finality," this was it. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-37 (1958).[1] Until now, the Commission has applied the rationale of res judicata to its own decisions, contrary to the Company's notion that such an assertion is "frivolous" (Br. p. 60, n. 30).

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[1] Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958). Speaking of a litigant's failure to seek review under Section 313(b) of a point decided by the Commission, this Court said: "Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." *Id.* at 336-37.

As recently as 1962, in refusing to allow an applicant to withdraw, without prejudice, several license applications after it had failed to meet certain requirements of the Commission, a unanimous Commission asserted that "to allow withdrawal of the license applications without prejudice would not enable the doctrines of *res adjudicata* and collateral estoppel to take effect."[2] The conclusion is compelled that the company's priority under its permit was conclusively laid to rest in 1958 and can not properly be resurrected in this subsequent proceeding to defeat Public Power's preference rights to High Mountain Sheep.

VIII. THE ISSUE OF POST-MORTEM PERFORMANCE: IF THE COMPANY'S PERMIT INCLUDED HIGH MOUNTAIN SHEEP, DID THE COMPANY PERFORM THE PERMIT'S WORK OBLIGATIONS BEFORE OR AFTER THE STATUTORY DEADLINE?

The question is important because Section 5 of the Act imposes a maximum period of three years on a preliminary permit "for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements." It cannot be extended. The Company's pro forma

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[2] Robert P. Wilson, 28 F.P.C. 571, 574 (1962). In Columbia Railway and Navigation Co., 1 F.P.C. 78, 86 (1933), the Commission asserted: "Upon the application for the amendment of the license the Commission limits its consideration to the scope of the amendment and regards as res adjudicata those questions which were necessarily determined by a predecessor Commission at the time of the issuance of the original license." The same rule would seem to apply as well where, as here, the prior order involved the denial of a license. See also Northern Natural Gas Co., 11 F.P.C. 278, 283-84 (1952), Carolina Aluminum Co. v. F.P.C., 97 F. 2d 435 (4th Cir. 1938).

High Mountain Sheep license application was filed on the last day of that three-year term.[1]

We say that the maximum statutory period of the permit expired eighteen months before the Company submitted a bona fide license application on the High Mountain Sheep project, conforming to the requirements of the Act; that if the permit encompassed that site, the permit's work obligation necessarily applied to it;[2] that no work was done, that no priority was earned, before the permit expired.

The Company replies that: (1) the Company undertook site investigations in 1957 (Br. 65); (2) "otherwise, the record contains no direct evidence as to Pacific Northwest's activities prior to March 31, 1958," but the nature of these can be inferred (Br. 65); (3) we did not raise this issue in timely fashion (Br. 64-65).

(1) What were the 1957 site investigations?

This was the direct testimony on "general site investigations" of Charles C. Bonin, the engineer who designed the High Mountain Sheep project, as selected by the Company for this record (I R. 7-8):

> "General site investigations were made in 1957 and a foundation exploration program, consisting of eight drill holes and three test pits, was conducted from October to December 1959."

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[1] "Acceptance for filing shall not waive any failure to comply with the rules and such failure may be cause for striking all or any part of such filings." FPC Rules of Practice and Procedure, Sec. 1.14(a)(2).

[2] Article 1(c) of the permit required the Company to "prosecute such investigations in such manner and at such rate as in the judgment of the Commission will insure the completion of all necessary investigations within the period of the permit" (I R. 161).

(Note: These latter dates were 19 to 22 months after the permit's maximum statutory period expired!).

What was the *1957*, not the *1959*, work?

At the trial, counsel for Public Power pressed this subject hard, making his point that "this is ridiculous, a farce, to present an application like this to the Commission" (III R. 867). The Presiding Examiner finally directed the Company to include testimony on the work done by its engineering organization, Ebasco (III R. 881). In response, the Company put into the record its instructions to Ebasco, dated March 27, 1957 (I R. 89-91), for the comparative investigation of High Mountain Sheep, Lower Canyon, and Nez Perce dams.[3] These were the "budgeted expenditures" for High Mountain Sheep (I R. 90):

"Field examination	
Engineers	$500
Geologist	400
"Design and cost estimates	
Ebasco	3,800
"Power studies	
Pacific Power & Light Co.	600
"Transmission studies	
Washington Water Power Co.	500
"Total	$5,800"

Note that of this total of $5,800, *exactly $900 was to be spent on field work.*

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[3] The chronological order of these events is as stated, notwithstanding the relative page numbers of the record now before this Court. This can be verified from the Commission's original pagination, shown at the top of the pages of the Court's record.

Moreover, to help out on the $3,800 of office studies the letter adds: "We have sent you . . . a copy of the Corps of Engineers Interim Report #4 on The High Mountain Sheep Dam. The Corps will ship to you from Walla Walla full size prints of their Mt. Sheep topographic map and plant layout." So they did. We know this because the license application filed March 31, 1958, contained, as the required Exhibit L geologic data, three drawings marked on their face as having been taken from this same Corps of Engineers report (I R. 198-200).

And what else was done before March 31, 1958? Nothing. The Company admits: "Otherwise the record contains no direct evidence as to Pacific Northwest's activities prior to March 31, 1958," (*id.*).

(2) What is the "nature" of the additional work before March 31, 1958, that can be "inferred" from the record? The Company's explicit record repels the inference of any work at all.

Article 9 of the permit requires that the Company "shall submit at the close of each six-month period from the effective date of the preliminary permit . . . accurate statements of the work accomplished during the period and of the work contemplated under the preliminary permit for the ensuing period" (I R. 156).

Six of these semi-annual reports are in the record. Not one says a word about work either done or contemplated on High Mountain Sheep (II R. 821-32).

On March 11, 1958—twenty days before the three-year period would expire—the Company wrote the Commission proposing a ten-month program of *future* work to compare High Mountain Sheep with Nez

Perce. Specifically, it said it would (in the *future*), *inter alia*:

> "(a) make geological investigations and studies;
>
> "(b) do such engineering work, including preparation of maps, plans, and specifications, as may be necessary, to determine problems of construction, quantities of earth and rock to be moved, materials and supplies required, type of structure to be built, and such other determinations as may be relevant to make comparable estimates of cost.
>
> * * *
>
> "Applicant intends to prepare and file an amended application for a license for such project as appears as a result of such study to be economical and practical and meets the requirements of Section 10(a) of the Federal Power Act." (II R. 715.)

These are exactly the things that Section 5 of the Act—the only source of the word "priority"—says shall be done during the maximum statutory term of the permit; the priority is granted for the sole purpose of protecting the permittee during the performance of this work during, not after, that statutory term. The phraseology is almost identical with the work requirements stated in the permit (Art 1 (B), (C), I R. 161), three years earlier.

This proposal was really an effort to extend the time for performance of the work obligations of the permit ten months beyond its statutory expiration date, if priority was to be claimed under that permit on the High Mountain Sheep site. The Commission rejected that proposal March 20, 1958 (II R. 862). Shall the Court infer from this record that the Company thereafter did in eleven days what it said it would require ten additional months to do?

No wonder it was necessary to pad the application on March 31 with 29 drawings of the rejected Pleasant Valley-Low Mountain Sheep dams (III R. 883-911). This was not the filing of "tentative" plans later changed; it was the filing of false plans, in the knowledge that the structures depicted would never be built —could not be built, because the Commission had just denied a license for those very structures.

(3) But, says the Company, the question of whether the work was done before March 31 on the exhibits which were filed after (18 months after) that date "simply is not a matter which was questioned during the hearing" (Br. 66).

On April 18, 1958, the National Hell's Canyon Association and Northwest Public Power Association filed a motion to dismiss the Company's license application (filed just 18 days earlier) on the ground that it was incomplete and failed to meet the filing requirements of the Act and the Commission's regulations (IV R. 324-28). The Commission never acted on this motion.

This issue was raised again during the first week of the hearing before the Presiding Examiner by Public Power's counsel, in quite vigorous prose (III R. 866-67): "There is no engineering work being done here which could possibly result in building the project .... This is ridiculous, a farce, to present an application like this to the Commission."

It was then; it is now.

IX. THE NON-EXISTENT ISSUE OF THE FISHERY

The assertion (F.P.C. br. 59):

> ". . . Unlike the Supply System which has always sought to minimize the fish problem, Pacific Northwest has always given it primary consideration."

Similar innuendos appear repeatedly in the Company's brief, and are echoed by several intervenors.

The answer:

First, the assertion is irrelevant: Does the Commission imply that the fish protection measures that it would require in its license would differ, depending on its choice of licensees, or that its enforcement of fish conservation would be less effective against the one than against the other?

Second, the assertion is not only totally untrue, but a distortion by the Commission of its own dealings with the fishery resource of the Middle Snake. It was the *Commission,* not Public Power, that announced in 1958 (when the Company's proposal for the Pleasant Valley project was rejected):

> "The record shows that the biological problem at Nez Perce is generally similar to that at other high dams, but that the engineering problem increases with the drawdown of the reservoirs. We are of the view that this engineering problem is no greater than many others that must be solved in connection with any project of the size of Nez Perce." (II R. 850-851)

and, after considering the fish problem:

> "There is nothing in this record which convinces us that the Nez Perce project could not be con-

> structed under a license issued pursuant to the provisions of the Federal Power Act." (II R. 851)

This determination that the fish problem could be solved was the basis for the Commission overall determination, in the same opinion:

> "It is readily apparent from the studies presented in House Document 531, in Senate Document No. 51, and from those prepared by the Staff for the Middle Snake Basin that any combination of projects which includes Nez Perce is consistently superior to any combination of projects which does not include Nez Perce." (II R. 842)

It was in response to this mandate from the Commission, unchanged by anything on the Commission record between 1958 and 1960, that Public Power filed its application for Nez Perce in March, 1960. In it, and in testimony supporting it, Public Power included completely engineered proposals for protection of the fishery resource (pp. 15811-15821, 16019-16028 of the original Commission record).[1] The Supply System was prepared to expend $30,952,000 on these facilities, solely to protect the salmon runs (*ibid.*, p. 15712). This figure was later raised to $33,512,000 (*ibid.*, p. 16162). During the course of the hearing, when representatives of the fishery agencies of the States indicated doubts of their own that the FPC determination of 1958 was still valid, and insisted that a Nez Perce project would threaten the fishery resource, Public Power responded with a modification of its application to include a proposal for a dam at High Mountain Sheep, a site considered more favorable by the fishery representatives.

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[1] Not printed but filed with this Court and available as reference material in the briefs of all parties, by stipulation among the parties.

Again, Public Power submitted to the Commission completely engineered proposals for fish passage at High Mountain Sheep, together with testimony from engineers and biologists indicating that the facilities would be effective (*ibid.*, pp. 16268-16276, 13660-13663).

Public Power's record is, therefore, one of total concern with protection of the fishery resource in the manner and under the terms suggested by the Commission itself.

Contrast this record with the Company's: In this proceeding the Company initially refused to file any designs at all for fishways at its High Mountain Sheep project. Adopting a cavalier view of a licensee's responsibilities to the fishery resource, the Company declared that plans for fishery protection were the burden of the Department of the Interior (IV R. 25-26; Comm. record pp. 160-162, 3028-3030). The Company further took the position that the High Mountain Sheep site on the Snake was superior to any other in this reach because past damage to the fishery resource at the Idaho Power Company dams, up-river, left little in the Snake to be damaged by any additional projects on that river. (Comm. record pp. 8259-8261, 15146, 8235-8237, 8177-8192).

Demonstrating the graphic difference in the concern of the respective applicants for the fishery resource, Public Power filed a petition with the Commission asking it to require the Company to submit its plans, which it had heretofore refused to do, for fishways at High Mountain Sheep (*ibid.*, pp. 26765-26775). The Company opposed this petition (*ibid.*, pp. 26793-

26797). It was only on the specific demand of the Commission Staff Counsel (*ibid.* pp. 5291-5292) that the Company finally filed five "Design sketches," not fully engineered designs as Public Power had (*ibid.*, 9318). The vagueness of these sketches insulated them from informed cross-examination by any of the parties (*ibid.*, pp. 8062-63, 8094, 8156-65, 8188-89, 7935, 8344). The Company's chief fish biologist was not willing to predict that these facilities would work (*ibid.*, p. 8269) and was joined in his doubts by the leading witness for the State fishery agencies (*ibid.*, p. 9116).

Indeed, when it came to comparing the two overall plans for the development of this stretch of the river (the High Mountain Sheep plan, containing that project and two others—Lower Canyon and China Gardens—and the Nez Perce plan containing that project, Whitebird and China Gardens), the Company simply refused to submit to the Commission any designs or cost estimates for fishways for the supplementary projects in each plan (II R. 625, footnote (e)). The Company threw up its hands and declared that no protection of the resouree at these supplementary sites was feasible, and that it had made no plans for it (pp. 357 *et seq.* of the original Commission record). In contrast, Public Power had again manifested its awareness of its obligation to protect the fish by filing plans and estimates for fish protection works at all of these supplementary projects (ibid., pp. 16162, 16285-93). Their cost was over $60,000,000, as tabulated by the Commission. (II R. 625) That tabulation carries the Commission's footnote: "PNPC did not present evidence of the cost of fish facilities."

Public Power's position on the fishery resource was stated in its initial brief before the Commission:

> "If granted a license . . . WPPSS intends to conserve the affected fishery resource and to direct the required effort and funds to this end—before, during, and after construction of the project."

That is the record of Public Power's efforts to protect the fishery. The Commission's contrary insinuation in its brief is a gratuitous affront to Public Power's consistent efforts to conserve this priceless natural resource. It ignores the Commission's own responsibility for first demanding, then rejecting, development of the Nez Perce site.

X. COULD IDAHO AND OREGON VETO THE COMMISSION'S CHOICE OF PUBLIC POWER AS A LICENSEE?

Oregon, when opposing our petition for certiorari, argued that Public Power, even if licensed by the Commission, could not build and operate the High Mountain Sheep project on her borders because she had licensed the Company, but not the municipality (Br. opp. cert., p. 2). Now, however, she does not mention her own veto, but says (Br. 4) that Idaho can enforce one.

Idaho agrees (Br. 13). She cites sections of her statutes (Idaho Code Sec. 61-327, 30-501, 30-502, 42-206) which she says prohibit a foreign municipality from owning and operating a power plant in that State, while permitting a foreign company to do so.

Both States further argue (Ore. Br. 4, Ida. Br. 12) that Public Power does not have authority under Washington law to build and operate this project outside Washington's borders. That State decided otherwise when it issued Public Power a permit to exercise such powers, conferred by Washington statutes, to build and operate this specific project (I R. 251). See R.C.W. 43.52.391, 43.52.360, 54.04.020, 54.16.040, 54.16.050, 43.52.300. The Commission, although importuned by the Company to decide against Public Power's capacity under Washington law, refused to pass on the question (II R. 641). As no one excepted, there is nothing of the sort here to decide. It is quite true that a United States District Court has decided that issue against Public Power in *Washington Public Power Supply System* v. *Pacific Northwest Power Co.*, 217 F. Supp. 481 (D. Ore. 1963), but the Court of Appeals for the Ninth Circuit, on appeal, has taken the case from its docket pending final decision of the present judicial review of the Commission's order denying our license application. *Washington Public Power Supply System* v. *Pacific Northwest Power Co.*, 332 F. 2d 87 (9th Cir. 1964).

The licensing provisions of the Federal Power Act supersede any State statutes which attempt to hinder the full exercise of all powers granted by the Commission. *Seattle* v. *Beezer*, 376 U.S. 224 (1964), *reversing* 62 Wash. 2d 569 (1963); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *FPC* v. *Oregon*, 349 U.S. 435 (1955); *First Iowa Hydro-electric Cooperative* v. *FPC*, 328 U.S. 152 (1946); *P.U.D. No. 1 of*

Pend Oreille County v. *FPC*, 308 F. 2d 318 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963); *State of Washington Department of Game* v. *FPC*, 207 F. 2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

Respectfully submitted,

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